

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(SAJ)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S RESPONSE TO STATE OF
ARKANSAS'S MOTION FOR LEAVE TO FILE AN *AMICUS* BRIEF**

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), hereby submits this response in opposition to the State of Arkansas's Motion for Leave to File and *Amicus* Brief [DKT #1403] ("*Amicus* Motion"). Because the State of Arkansas's proposed *amicus* brief would not be analytically useful to the Court and is, thus, contrary to principles governing *amicus curiae* participation, the *Amicus* Motion should be denied.¹

I. The State of Arkansas's *Amicus* Motion should be denied because the subject of its proposed *amicus* brief is not useful to the Court's consideration of the State's Motion for Preliminary Injunction

The principles governing the grant to participate as *amicus curiae* are well-settled.

"There is no inherent right to file an *amicus curiae* brief with the Court. It is left entirely to the discretion of the Court." *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D. Nev. 1999);

¹ The State of Arkansas not only seeks leave to file an *amicus* brief, but also "all such further relief as the Court deems just and equitable." See Supplemental Brief, p. 6. A request for additional relief beyond permission to file an *amicus* brief is improper, particularly since the State of Arkansas's request for leave to intervene was denied. See DKT #1141.

Fluor Corp. & Affiliates v. United States, 35 Fed. Cl. 284, 285 (1996); *Waste Management of Pennsylvania, Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995). "A court may grant leave to appear *amicus curiae* if it deems the proffered information timely and useful." *Hawksbill Sea Turtle v. FEMA*, 11 F. Supp. 2d 529, 541 (D.V.I. 1998), quoting *Liberty Lincoln Mercury v. Ford Marketing Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993).

Not only must the proffered information be timely and useful, but the movant seeking to participate as *amicus curiae* "must be a friend of the court and not a friend of a party to the cause." *Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D. Ill. 1982). As explained by the *Leigh* court:

Historically . . . an *amicus curiae* is an impartial individual who suggests the interpretation and status of the law, gives information concerning it, and whose function is to advise in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another. . . . Indeed, if the proffer comes from an individual with a partisan, rather than impartial view, the motion for leave to file an *amicus* brief is to be denied, in keeping with the principle that an *amicus* must be a friend of the court and not a friend of a party to the cause. C. Rembar, *The Law of The Land* 330 (1980). . . . The privilege of being heard *amicus* rests in the discretion of the court which may grant or refuse leave according as it deems the proffered information timely, useful, or otherwise, 3A C.J.S. *Amicus Curiae* § 3

Leigh, 535 F. Supp. at 420-22 (citation omitted).

Furthermore, unnecessary *amicus* submissions have been criticized as imposing a "real burden on the court system," "impos[ing] a burden of study and the preparation of a possible response on the parties," "more often than not sponsored or encouraged by one or more of the parties," possibly "intended to circumvent the page limitations on the parties' briefs," and "attempts to inject interest-group politics into the federal appellate process by flaunting the interest of a trade association or other interest group in the outcome." *National Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 616-17 (7th Cir. 2000).

The State of Arkansas's *Amicus* Motion contravenes these principles because its proposed *amicus* brief would lack utility inasmuch as it would fail to address facts or legal principles that are relevant to the Court's consideration of the State's motion for a preliminary injunction. In this regard, participation as *amicus curiae* is not permitted where the proposed submission is not useful to the Court. See *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1271, 1274 (D.N.M. 2002) (denying leave to file *amicus* brief for lack of utility); *Long*, 49 F. Supp. 2d at 1177-78 (same); *Hawksbill Sea Turtle*, 11 F. Supp. 2d at 541 (denying leave because proposed *amicus* submission "lack[ed] utility since it does not directly address the facts or law at issue in this case").

Here, the State of Arkansas seeks to justify its *amicus* participation on two grounds: that the requested preliminary injunction will allegedly (1) "cripple one of Arkansas's largest industries" and (2) "nullify Arkansas statutory and regulatory law." See *Amicus* Motion, p. 2. With respect to the first ground, putting aside the hyperbole,² the fact is that an injunction's business impact is not an appropriate consideration for the Court when adjudicating a governmental plaintiff's request for an injunction. As explained in the State's motion for preliminary injunction, "the law of injunctions differs with respect to governmental plaintiffs (or private attorneys general) as opposed to private individuals. Where the plaintiff is a sovereign and where the activity may endanger the public health, 'injunctive relief is proper, without resort to balancing.' *Illinois v. Milwaukee*, 599 F.2d 151, 166 (7th Cir.1979), *rev'd on other grounds*, 451 U.S. 304, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981)" *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 337-38 (4th Cir. 1983); see also *EPA v. Environmental Waste Control, Inc.*, 917 F.2d 327, 332 (7th Cir. 1990) (same); *United States v. Bethlehem Steel Corp.*, 38 F.3d

² It is noteworthy that the moratorium on land application of poultry waste in the Eucha-Spavinaw Watershed did not appear to cripple the poultry industry.

862, 868 (7th Cir. 1994) (same); *United States v. Marine Shale Processors*, 81 F.3d 1329, 1359 (5th Cir. 1996) ("when the United States or a sovereign state sues in its capacity as protector of the public interest, a court may rest an injunction entirely upon a determination that the activity at issue constitutes a risk of danger to the public"). Because "balancing" is not appropriate when adjudicating a governmental plaintiff's request for an injunction,³ the State of Arkansas's proposed *amicus* brief on the subject of economic impact does not offer insights that are appropriate for the Court's consideration.

With respect to the second ground advanced by the State of Arkansas -- whether the relief being sought by the State of Oklahoma under 42 U.S.C. § 6972(a)(1)(B) of the federal RCRA statute may conflict with Arkansas state regulatory programs -- it, too, is an issue that does not support *amicus* participation. The law is well-established: an imminent and substantial endangerment claim under 42 U.S.C. § 6972(a)(1)(B) "is not superseded by a state program." *Eckardt v. Gold Cross Services, Inc.*, 2006 WL 2545918, *2 (D. Utah Aug. 31, 2006) (collecting cases). Thus, it is not at all surprising that the State of Arkansas's *Amicus* Motion is devoid of any caselaw supporting the proposition that a RCRA imminent and substantial endangerment claim should yield to an allegedly conflicting state solid waste program.⁴ Simply put, as to this

³ In fact, it is noteworthy that this Court has denied discovery pertaining to the potential adverse economic consequences of the State's case on contract growers and the economies of Oklahoma and Arkansas on relevancy grounds. See October 24, 2007 Opinion and Order [DKT #1336], p. 3 ("The motion [DKT #1221] is denied as to Interrogatories numbered 7, 8 and 9 on grounds of relevance").

⁴ As explained in *Burlington Northern and Santa Fe Railway Company v. Grant*, 505 F.3d 1013, 1020 (10th Cir. 2007), the language of 42 U.S.C. § 6972(a)(1)(B) "is intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes." (Citations and quotations omitted) (emphasis retained). Thus, if, contrary to 42 U.S.C. § 6972(a)(1)(B) of the federal RCRA statute, the State of Arkansas's statutory and regulatory law in fact authorizes or permits persons to contribute to the handling, storage, treatment, transportation, or disposal of solid waste in such a manner that it

ground, the State of Arkansas has failed in its *Amicus* Motion to articulate an *amicus* interest that is supported by the law. As such, the proposed *amicus* participation would not be useful.

In sum, the State of Arkansas cannot satisfy the utility requirement of *amicus* participation, and its *Amicus* Motion must be denied.⁵

II. Conclusion

For the foregoing reasons, the State of Arkansas's Motion for Leave to File an *Amicus* Brief [DKT #1403] should be denied.

Respectfully Submitted,

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may present an imminent and substantial endangerment to health or the environment, then in such instance, such Arkansas statutory and regulatory law would be pre-empted by the federal RCRA statute. *See, e.g., Emerson v. Kansas City Southern Railway Company*, 503 F.3d 1126, 1128 (10th Cir. 2007) ("Because of the supremacy of federal law, state law that conflicts with federal law is without effect") (quotations and citations omitted); *cf. Blue Circle Cement, Inc. v. Board of County Commissioners of the County of Rogers*, 27 F.3d 1499, 1504 (10th Cir. 1994) ("... there may very well be both express and implied preemption by RCRA of more permissive state and local regulations pertaining to hazardous wastes ...").

⁵ It should not be overlooked that given the number of Defendants responding to the State's motion for preliminary injunction, and the anticipated intensity of their response briefs, the proposed *amicus* brief could not present anything of relevance which will not be more than adequately covered by Defendants.

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